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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 276

MORTON SALT COMPANY and DIAMOND CRYSTAL SALT COMPANY,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

## JURISDICTIONAL STATEMENT OF DIAMOND CRYSTAL SALT COMPANY

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## JURISDICTIONAL STATEMENT OF DIAMOND CRYSTAL SALT COMPANY

Appellant Diamond Crystal Salt Company ("Diamond") appeals from the Amended Final Judgment of the United States District Court for the District of Minnesota, Fourth Division ("District Court"), holding that Diamond and Morton Salt Company ("Morton") "have combined and conspired to fix prices of rock salt in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act", and submits this Jurisdictional Statement to show that the United States Supreme Court has jurisdiction of this appeal and that substantial questions are presented.

## OPINION BELOW

The Memorandum Decision (Appendix A) of the District Court dated August 6, 1964, is unreported.

## JURISDICTION

This action was brought by the United States pursuant to Section 4 of the Sherman Act, 26 Stat. 209, as amended, 36 Stat. 1167, 62 Stat. 909, 15 USC 4, to enjoin an alleged violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. 1.

The Findings of Fact and Conclusions of Law (Appendix B) of the District Court were entered on November 24, 1964, as was its Final Judgment (Appendix C). Its Order amending that judgment (Appendix D) was entered on February 19, 1965, as was its Amended Final Judgment (Appendix E). Diamond's Notice of Appeal was filed on April 19, 1965, in the District Court.

The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *Meat Drivers v. United States*, 371 U.S. 94.

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person * * * shall * * * be subject for the same offense to be twice put in jeopardy of life or limb; * * * nor be deprived of * * * property, without due process of law; * * *"

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal * * *"

Section 4 of the Sherman Act, 26 Stat. 209, as amended, 36 Stat. 1167, 62 Stat. 909, 15 U.S.C. 4, provides in pertinent part:

> "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title * * *."

## QUESTIONS PRESENTED

1. Where the United States prosecutes a criminal antitrust suit which results in a jury verdict of not guilty, is the United States then barred from prosecuting a "civil" suit against the acquitted defendants involving the identical charge under the same statute (a) by the doctrine of *res judicata* (notwithstanding *United States v. Real Estate Boards*, 339 U.S. 485), or (b) by either the double jeopardy clause or the due process clause of the Fifth Amendment to the United States Constitution?

2. In view of the uncontroverted evidence showing that (a) no market existed for de-icing rock salt in the freight advantage area enjoyed by Diamond's South Louisiana mine, (b) the market for such homogeneous product nearest to Diamond's mine was the Midwest, (c) because such market was substantially more distant from Diamond's mine than from the mines of its competitors, Diamond could compete with them for the sale of de-icing rock salt to Midwest governmental agencies only by "absorbing" substantial amounts of freight, and (d) Diamond had access to abundant, current and legitimate information concerning the components of its competitors' bid prices,

(i) did Diamond violate Section 1 of the Sherman Act by adopting a policy of "meeting but not beating" its estimate of the lowest price to be bid to each such agency?

(ii) did the District Court err in holding that Diamond adopted such policy in concert with others?

## STATEMENT

1. Diamond, Morton and International Salt Company ("International") were *acquitted* by the jury in a companion criminal suit (Criminal Action No. 4-61 Cr. 65, United States District Court for the District of Minnesota) instituted by the United States in which the Indictment was *identical*, except for appropriate changes in form, to the Complaint filed by the United States in this civil antitrust suit (App. 9a). This case was tried, pursuant to the stipulation of the parties, on the record made in such criminal case (as supplemented by Morton's and Diamond's answers to two interrogatories) so that the District Court, which did not try the criminal case, did not have the benefit of the "demeanor" evidence considered by the jury therein. Despite these facts, the District Court concluded in its Findings of Fact that Diamond and Morton, in concert with unnamed co-conspirators, violated Section 1 of the Sherman Act by adopting a policy of pricing de-icing rock salt "to the end that bidding on this commodity to be furnished to * * * government agencies * * * should produce identical prices. The policy, in application, consisted simply and avowedly of not competing on prices, or otherwise stated, 'meeting but not beating the price of a competitor.'" (Finding No. IV, 11a).

The Findings of Fact were "limited to sales of de-icing rock salt by Morton from 1956 to 1960, by Diamond from 1957 to 1960 * * * made under sealed bids submitted to

one or more of" 16 specified Midwest governmental agencies (Finding No. I, 10a).

2. Prior to the date of the Memorandum Decision, only one related suit for treble damages pursuant to Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 15, had been instituted. Subsequent to such date, Morton, Diamond, International and other rock salt producers and distributors have been sued for treble damages in 21 suits filed in five districts by at least 600 governmental agencies (either as original plaintiffs, intervening plaintiffs or identified potential intervenors). Despite the jury acquittal in the criminal case, each treble damage plaintiff has asserted or implied that it is entitled to the benefit of Section 5(a) of the Clayton Act, 38 Stat. 731, as amended, 69 Stat. 283, 15 U.S.C. 16(a).

3. The evidence established the following uncontradicted facts:

(a) Throughout the period covered by the Findings, 1957 to 1960, governmental agencies annually invited suppliers to submit sealed bids for the sale of de-icing rock salt on a delivered price, i.e., f.o.b. destination, basis (Tr. 236, 323, 475, 1650). Each invitation to bid specified the points of delivery as well as the alternative methods of delivery, e.g., rail or truck, and the quantity units, e.g., bulk or 100 lb. bags, upon which bids could be submitted. All bids were publicly opened and announced by the agency at a place and time specified in its invitation (Tr. 413, 572, 614, 701). After the bids were opened, the agency decided, as to each point of delivery, which type or types of bids it would accept. A separate award was then made for each destination to a supplier whose bid for each chosen type was or equalled the lowest submitted (Tr. 514-515, 575, 980, 1651). Although the successful bidder was obli-

gated to supply the agency's total requirements for the season, whatever they might prove to be, the agency was under no obligation to make even a minimum purchase (Tr. 479).

(b) Due to the great bulk and weight of rock salt, the cost of its transportation was a large percentage of its delivered price. Consequently, each producer had a distinct competitive advantage in the area surrounding its mine (DX-21, Tr. 1744).

(c) In January, 1957 Diamond acquired a rock salt mine in South Louisiana and thereby obtained for the first time a supply of de-icing rock salt (Tr. 1641). No market for de-icing rock salt existed in the freight advantage area surrounding Diamond's mine. The market nearest to Diamond's mine was the Midwest (Tr. 1644-5). At the time Diamond acquired its mine, International, from its mine in Detroit, and Morton, from its mine across the Detroit River in Ojibway, Ontario, sold at least 85% of the de-icing rock salt consumed in the Midwest (IX-11, MX-19). In most, if not all, of such market Diamond's rail transportation costs exceeded International's by a *minimum* of $2.00 per ton (DX-19). For example, in 1957 the rail cost from International's Detroit mine to Indianapolis was $6.40 per ton, while Diamond's rail cost to Indianapolis from South Louisiana was $9.80 per ton. Since the delivered price paid by Indianapolis in 1957 was $14.80 per ton, International's plant return (i.e., delivered price minus cost of transportation) on Indianapolis' purchases was $8.40 per ton. By contrast, on the same delivered price Diamond's plant return per ton would have been but $5.00 (DX-20).

(d) Diamond partially overcame its severe freight disadvantage by substantially expanding a new, less expensive method of transporting South Louisiana rock salt to

the Midwest, i.e., by barge up the Mississippi River and its tributaries to depots from which deliveries would be made by truck (DX-24, Tr. 1705, 1715). As a result, large quantities of South Louisiana de-icing rock salt competed *for the first time* in the Midwest against de-icing rock salt produced in the Detroit area (DX-25). Despite the economies of Diamond's barge-depot-truck delivery system, the ratio between its transportation costs to the Midwest and its plant return often approached (and even surpassed) 1 to 1 (Tr. 1650). Since Diamond's transportation costs to Midwest agencies continued to exceed those of the Detroit area producers, Diamond's plant return remained less than theirs (DX-24).

(e) The adoption of Diamond's barge-depot-truck delivery system by other suppliers caused marked *declines* in the delivered price of de-icing rock salt sold in the Midwest (DX-1, 5, 6). At the same time the use of depots and truck deliveries enabled Midwest agencies to order de-icing rock salt on days' shorter notice than had previously been possible when deliveries were made by rail from the mine (Tr. 1942).

(f) Diamond captured a significant share of the Midwest market from International, the dominant Detroit producer (Tr. 1056, DX-51).

(g) If Diamond's bids exceeded its competitors', it would receive no awards (Tr. 515, 703-704). If, on the other hand, Diamond obtained a significant award by undercutting its estimate of the lowest bid to be submitted by any of its competitors, the reduction would, upon the opening of such bid, become known to its competitors and would cause them to retaliate (Tr. 1678-1679). Diamond therefore concluded that if it regularly bid below its estimate of the lowest delivered price, its substantial freight disadvantage would ultimately force it to "absorb" so much freight (that is, to reduce its plant return to such an extent) as to eliminate

itself as a competitor in the Midwest (Tr. 1671). Therefore, Diamond adopted a policy of "meeting but not beating" the *estimated lowest* delivered price to be bid by any of its competitors to Midwest governmental agencies (Tr. 1673).[1]

(h) Diamond had access to a vast amount of current market information upon which to base its estimate of such lowest delivered price. In its Memorandum Decision the District Court acknowledged that the sources of such information were "legitimate" (App. 7a). They included bid opening reports which Diamond received in a continuous flow throughout each bidding season disclosing the prices currently being paid by Midwest agencies (DX-27), records reflecting the bids received by each such agency at its preceding bid openings (Tr. 1935), competitors' price bulletins obtained from Diamond's customers (Tr. 841), rail and truck tariffs approved by the Interstate Commerce Commission and state and local counterparts thereof (Tr. 634, 701, 1659), and invoices reflecting Diamond's purchases of rock salt (Tr. 1814).

(i) *Each* of Diamond's bids which was put into evidence by the United States was computed upon the basis of market information obtained from one or more of such legitimate sources (Tr. 1915).

(j) Despite the availability of this market information, Diamond matched the lowest delivered price in less than one-half of its bids (DX-29, 30, 31).

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[1] Even though Diamond matched its estimate of the lowest bid to be submitted to Milwaukee in 1961, Diamond's bid proved to be the lowest by $1.30 per ton (GX-102). On succeeding bids International and Morton retaliated by lowering their prices by at least $1.30 per ton below the prices they had submitted prior to Diamond's 1961 Milwaukee bid.

4. Diamond explicitly denied it participated in any manner in any price-fixing agreement or understanding (Tr. 918, 2046). The United States made no effort to rebut Diamond's unqualified testimony that, in recognition of its substantial freight disadvantage, Diamond unilaterally formulated its de-icing rock salt pricing policy (Tr. 1672).

5. In reaching its decision that Diamond adopted its de-icing rock salt pricing policy in concert with others, the District Court ignored the uncontroverted evidence that none of Diamond's discussions with competitors related to such policy.

## THE QUESTIONS ARE SUBSTANTIAL

1. The first question presented by this Jurisdictional Statement is the same as the second question set forth in Morton's concurrently filed Jurisdictional Statement. Diamond hereby incorporates by reference that portion of Morton's Jurisdictional Statement which discusses such constitutional question, not because Diamond places less emphasis upon the novelty, importance and general applicability of such question, but only to avoid needless repetition of an argument upon which the position of the two companies is identical.

2. On Page 214 of the *Report of the Attorney General's National Committee to Study the Antitrust Laws* recognition is given to the basic and unalterable economic principle upon which Diamond's de-icing rock salt pricing policy was based:

> "The Committee believes that recognition of the complex role performed by geographic pricing in a national market is basic to any valid legal appraisal of delivered pricing. Particularly in the sale of basic homogeneous commodities, where transportation costs mount high and the buyer's susceptibility to advertising slogans and fancy wrappings run low, rivalry among suppliers must consider the substantial competitive advantages of proximity to the consuming market. To compete successfully for sales

> in a distant area, sellers must quote prices to prospective customers which *after* taking into account the elements of freight cannot exceed the offer of a more favorably situated rival."

On pages 215-6 of such Report the Committee expanded this thesis:

> "In the sale of basic homogeneous commodities, informed buyers will never pay more to one seller than to his rival for identical and standardized goods; some tendency toward price uniformity is hence inevitable, and may equally indicate effective competition and successful collusion."

Squarely presented by this appeal is the propriety of the pricing policy by which Diamond captured a significant percentage of the Midwest market for de-icing rock salt—a high transportation cost, homogenous commodity purchased by informed buyers—from International which theretofore had been faced with continuous competititon in such market only from Morton. The legality of Diamond's pricing policy of "meeting but not beating" the estimated lowest delivered price must necessarily be of significance to all basic commodity producers which seek to expand their markets into territories in which they are burdened by a freight disadvantage.

It would be unrealistic and economically unwise for a disadvantaged producer like Diamond to undercut deliberately the delivered prices quoted by its local competitors whose promixity to the market enables them to continue the price cutting cycle to a point which would make it impossible for the distant producer to remain in competition. Consequently, if a policy like Diamond's is, as asserted by the District Court, one of "not competing on prices" (Finding IV, App. 11a) and thus is inherently illegal, the likely

result will be the creation of a territorial monopoly for each producer within its own freight advantage area.[2]

The legal issue thus presented is whether the doctrine of conscious parallelism, as enunciated in *Theatre Enterprises v. Paramount,* 346 U.S. 537, permits a disfavored company like Diamond to match the estimated lowest delivered price in a distant market through utilization of legitimate information.

While the District Court stated in its Memorandum Decision that the doctrine of conscious parallelism was "particularly pertinent" in this case (App. 8a), such court nevertheless failed to apply the doctrine because it said there were "sufficient additional facts and circumstances" which convinced it that the United States had proved the existence of a price-fixing agreement "by the greater weight of all the evidence" (App. 8a).

Just what these "additional facts and circumstances" were, the District Court did not say. Nowhere does the Memorandum Decision (which comprised the District Court's *only* independent analysis since its substantive Findings of Fact and Conclusion of Law were adopted almost verbatim from proposals submitted by the United States) point to evidence showing that Diamond did other than what it said it did, i.e., independently adopt its policy

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[2] In view of the fact that Diamond's plant return on its sales to Midwest governmental agencies was substantially less than that of its competitors (e.g., $5.00 per ton vs. $8.40 per ton on Indianapolis' 1957 purchases, page 6 *supra*), it can only be concluded that the District Court was so mesmerized by the receipt of identical bids that it ignored, not only the fact that substantial price declines occurred during the Indictment period as the result of Diamond's entry into that market, but also that, from Diamond's point of view, price competition was indeed keen since Diamond was willing to accept substantially *less* for an identical product than were its rivals.

to "meet but not beat" the estimated lowest bid. True enough, the Memorandum Decision recites that the United States *claims* that Diamond adopted its policy in concert with others, and the Findings of Fact, the work product of the United States,[3] refer to telephone calls and to meetings which took place "in Minnesota, Illinois, Michigan and elsewhere" (Finding No. VII, App. 12a). But nowhere does the Memorandum Decision or the Findings of Fact reflect that the evidence is *undisputed* that most of those meetings and telephone calls did not even include Diamond and that Diamond *never* discussed its de-icing rock salt pricing policy with any competitor.

If, in fact, an agreement involving Diamond to adopt a "formula" for pricing de-icing rock salt was spawned at meetings or by telephone conversations, Diamond's reliance upon *Theatre Enterprises* is misplaced. However, since Diamond's testimony is unrebutted that its pricing policy was not discussed with any competitor, the District Court, in order to hold as it did, necessarily had to disbelieve Diamond's witnesses whom, unlike the jury in the companion criminal case, it did not see.[4]

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[3] In *United States v. El Paso Gas Company*, 376 U.S. 651, this Court commented unfavorably upon findings of fact which were "not the product of the workings of the district judge's mind". In so doing it quoted, obviously with approval, the recent statement of Judge J. Skelly Wright in *Seminars for Newly Appointed United States District Judges* (1963), p. 166, that findings prepared by counsel "won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case."

[4] Rule 52(a), F.R.C.P., as interpreted by Judge Frank in *Orvis v. Higgins*, 180 F. 2d 537 (C. A. 2), in the light of this Court's decision in *United States v. Gypsum Co.*, 333 U.S. 364, directs the appellate court to apply the "clearly erroneous" standard in a manner which is consistent with the nature of the evidence before the trial court. Where the findings are based, as in the case at bar, on written evidence

*(Continued on next page)*

The Memorandum Decision of the District Court fails to disclose the underlying basis for its holding as to Diamond. It thereby left unanswered this vital question: did the District Court hold Diamond guilty because, without more, it unilaterally adopted and pursued a pricing policy that such court considered to be contrary to the public interest, or was the decision based upon credible evidence which persuaded the District Court that Diamond had in fact entered into an agreement to adopt that policy.

This distinction was pinpointed by Judge Medina in *United States v. Morgan*, 118 F. Supp. 621 (DC.SD.N.Y.), at page 634:

> "What the Sherman Act does is to declare illegal 'every contract, combination * * * or conspiracy' in restraint of trade or commerce * * *. The task of the judge is to determine whether the conduct challenged in the litigation contravenes the prohibitions of the staute. This is no mandate to the judiciary to decide anti-trust cases according to individual ideas of expediency, which may change according to the personal philosophy or even the po-

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*(Continued from preceding page)*
alone, Judge Frank recognizes that the appellate court is "as able as he [the trial judge] to determine credibility, and so we may disregard his finding". A different construction of Rule 52(a) was espoused by Judge Clark in *Heim v. Universal Pictures Co.*, 154 F. 2d 480, 491. Professor Moore commends the Frank view, 5 Moore, *Federal Practice*, §52.04.

Diamond submits that the Frank view should apply here, particularly since the District Court's Findings of Fact were the work product of the United States and thus "do not reveal the discerning line for decision of the basic issue in the case." *United States v. El Paso Gas Company, supra*, 651.

In any event, the decision of the District Court was "clearly erroneous" since consciously parallel behavior—here, submission of identical bids, is insufficient to sustain the plaintiff's burden of proof (*Theatre Enterprises v. Paramount, supra*) and since there was no "demeanor" evidence on which the District Court could disbelieve Diamond's uncontroverted testimony that it unilaterally adopted its de-icing rock salt pricing policy. Cf., *Dyer v. MacDougall*, 201 F. 2d 265, 269 (C. A. 2).

litical affiliation of the judge. It is the combination or joint action of the many which is the essence of the offense. Unless there is some agreement, combination or conspiracy the Sherman Act is not applicable.

"But it is suppposed by some that the requirement of combination is a mere empty phrase to which one must indeed do lip-service, but which may easily be got around by finding agreement, combination or conspiracy, when in truth and in fact no agreement, combination or conspiracy exists, provided the result obtained seems desirable and in the public interest. This is not the law but only another aspect of the false but seductive doctrine that the end justifies the means which, so far as I know, has never taken lodgment in American jurisprudence; and I hope it never will.

"True it is that conspiracies whether by business men or others engaged in unlawful schemes are often hard to detect. No direct proof of agreement between the wrongdoers is necessary; circumstantial evidence of the illegal combination is here as elsewhere often most convincing and satisfactory. But, when all is said and done, it is the true and ultimate fact which must prevail. Either there is some agreement, combination or conspiracy or there is not. The answer must not be found in some crystal ball or vaguely sensed by some process of intuition, based upon a chance phrase used here or there, but in the evidence adduced in the record of the case which must be carefully sifted, weighted and considered in its every aspect. This is an ardous but necessary task."

Perhaps the utter failure of the Findings of Fact, prepared as they were by the United States, to link Diamond's de-icing rock salt pricing policy to the telephone calls and meetings to which they refer in general terms only can be

explained by the willingness of the United States to pay "lip-service" to the requirements of the Sherman Act in its zeal to condemn identical bids as such.[5] This explanation does not, however, excuse the District Court from performing the "arduous but necessary task" of sifting, weighing and considering the evidence relating to Diamond "in its every aspect" to discover, not whether it approved of Diamond's de-icing rock salt pricing policy, but whether such policy was adopted by agreement with Diamond's competitors.

Absent the Expediting Act, Diamond would be entitled to an automatic and full appellate review of its contention that the District Court ignored the evidence relating to Diamond, i.e., its freight disadvantage which *compelled* the adoption of its de-icing rock salt pricing policy, the abundance of legitimate market information which made such policy workable, the absence of proof that Diamond discussed its pricing policy with competitors, the marked *decrease* in the price of de-icing rock salt which resulted from Diamond's barge-depot-truck delivery system, and the relatively low percentage of its identical bids.

By virtue of the Expediting Act, only this Court can afford the complete review to which Diamond would other-

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[5] In his letter dated July 31, 1962, transmitting the Report on Identical Bidding in Public Procurement, Attorney General Robert F. Kennedy said:

"Finally, I should make it clear to you that there are a number of reasons for the phenomenon of identical bids. These are analyzed in the report. The inclusion in the text tables of the names of firms which have submitted identical bids does not imply that these firms have engaged in illegal or improper activities. The names are included for analytical and informational purposes only. *If their inclusion contributes to public and business awareness and thus serves to discourage practices, however lawful, which result in identical bids, I believe the public interest would be well served thereby.*" (Emphasis supplied.)

wise be entitled. If such review is denied, the inherent legitimacy of Diamond's de-icing rock salt pricing policy—and thus the legitimacy of similar policies adopted by disfavored producers in many basic commodity industries—will remain unsettled. Also perpetuated will be the "false but seductive" doctrine condemned by Judge Medina in *United States v. Morgan, supra,* that the end espoused by the United States—here, the cessation of identical bids—justifies the means—disregard for the requirement in Section 1 of the Sherman Act of an agreement.

## CONCLUSION

Diamond's appeal presents substantial questions of public importance. Probable jurisdiction should be noted.

Respectfully submitted,

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# APPENDIX A

## UNITED STATES DISTRICT COURT
## DISTRICT OF MINNESOTA
## FOURTH DIVISION

UNITED STATES OF AMERICA,
*Plaintiff,*

v.

MORTON SALT COMPANY and
DIAMOND CRYSTAL SALT COMPANY,
*Defendants.*

No. 4-61 Civ. 162

### MEMORANDUM DECISION

This cause comes before the Court on a stipulation filed November 4, 1963, whereby the issues herein are submitted on the record in a criminal proceeding between the same parties.

Defendants are charged with violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1, the pertinent portion of which reads:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *."

The complaint alleges a conspiracy to fix the prices of rock salt. The issues herein are limited to sales to public authorities under sealed bids. The defendants in this civil proceeding are Morton Salt Company and Diamond Crystal Salt Company. Originally, Carey Salt Company and International Salt Company were parties, but consent decrees have been entered as to them. The co-conspirators not named as parties herein with which the evidence is

concerned primarily are Cutler-Magner Company, of Duluth, Minnesota, a distributor for Morton Salt Company, and Cargill Corporation, of Minneapolis, Minnesota, a distributor for Diamond Crystal Salt Company. The governmental agencies concerned are located in the States of Minnesota, Wisconsin, Michigan, Illinois, Ohio and Indiana. In these areas, the parties share some 85 to 95 per cent of the rock salt business. The annual sales to governmental agencies are admittedly substantial.

It is the plaintiff's contention that the record herein amply substantiates a finding that, during the period from 1956 to 1960, these defendants, with others involved acting in concert, adopted a policy of restrictive pricing of rock salt to the end that separate bidding on this commodity to be furnished to the various governmental agencies in the area involved should produce identical prices. This plan, according to the plaintiff, was carried out primarily by a so-called formula price fixing; that is, the defendants maintained arbitrary f.o.b. mine prices which bore no relation to their costs of production, overhead, or anticipated profits; that a method or plan was devised by the conspirators whereby each of the defendants, according to a prearranged plan or understanding in preparing bids to a particular governmental ageney, would first determine in order to meet the competitive price of the other competitors, the latter's f.o.b. prices. The f.o.b. prices were maintained, according to the plaintiff, at a high enough level to protect the pricing policy of the defendant suppliers, and directed to constitute a means whereby each of the rock salt suppliers in the industry would be better enabled to meet the bidding price of any particular supplier. In addition, plaintiff contends that a defendant bidder would in most instances include the rail freight rates of its competitor or competitors even though the shipment was to be made by water or by truck, knowing that to be the method which would be employed by its competitors in determining their bidding prices. In other words, plaintiff contends that if A is to bid against B, A will attempt to frame its bid on B's f.o.b. mine price and freight rates,

whether artificial or not, in attemtping to compute a competitor's delivered price, and with the designed purpose of meeting, that is to match and not beat the bidding price of its competitor or competitors. Plaintiff recognizes that, in addition, there is a practice among the defendants to obtain post-bidding information of their competitors. These practices, however, according to plaintiff, are all designed to carry out an understanding as to uniform bid prices among the suppliers of rock salt even though their purpose and intent may not always be attained. In other words, plaintiff contends that there was a concerted plan among the defendants to meet the price of all competition in all bidding so far as that plan could be accomplished. Plaintiff contends that its position as to the plan and practice followed by the industry in this regard is not only directly sustained by the evidence, including the meetings of the parties with each other to achieve this end, but that the record reflects what it terms a monotonous identity of the bids among the defendants. For instance, plaintiff points out that to the State of Minnesota in 1956, Morton, Cutler-Magner and International bid identically on some 67 locations. In 1957, to this State, the same bidders were identical on 57 locations. In 1958, to Minnesota, Cutler-Magner, International and Cargill were identical at 68 out of 69 delivered locations, and on a re-bid they were identical 53 times. In 1959, Cutler-Magner, International and Cargill participated in four separate invitations to bid to Minnesota, and on some 273 occasions the bids were from 95 to 100 per cent identical. In 1960, to the same State, Cutler-Magner International and Cargill were identical on 135 different bids involving truck and railroad bag deliveries, and on some 41 bids during that year, Cutler-Magner and Cargill were identical 90 per cent of the time. And to the City of Minneapolis during a period from 1957 to 1960, the Morton or Cutler-Magner or Cargill bids with International 47 times on bulk truck, bulk pick-up, bag truck or bag pick-up bids were identical. Diamond, however, submitted no bids to Minnesota municipalities during the period in question.

The record of Morton and International with Cutler or Cargill in bids to the State of Wisconsin in 1956, 1957, 1958 and 1959 reflects a percentage of identical bidding which varies from 94 to 100 per cent. In bids to the City of Milwaukee, Wisconsin, Morton and International were identical from 1956 to 1960. A similar record as to Morton and International was reflected in bidding to the City of Detroit, Michigan, the State of Ohio and the State of Ohio Turnpike Commission. Diamond, however, in 1958 as to Wisconsin area destinations was non-identical in 41 out of 62 bids, and in 1959 there was non-identity in 52 out of 72 of its Wisconsin bids, and on re-bid for that year Diamond was completely non-identical. In 1960 Diamond's bid to the State of Wisconsin was 94.4 per cent identical in 67 out of 71 bids, and 100 per cent identical in four bids with Morton and International to the City of Milwaukee. However, in 1960, as to Wayne County Road Commission of Michigan, Diamond was 100 per cent in identity as a bidder in some 17 bids with Morton and International. As to Illinois bidding in the year 1957, Diamond, International and Cargill, out of 181 bids, were identical in 165, or 91.2 per cent, and in 1959, in bag railroad and bulk railroad, Morton, Diamond and International in some 45 bids were 100 per cent identical, and in 1960, 90 per cent identical. These Illinois bids were made to the State of Illinois Highway Division. In bids to the State of Illinois Toll Road Commission, Diamond, Morton, International and Cargill were 100 per cent identical in the year 1960 in some 16 bids. In Ohio in the years 1958 to 1960, Diamond's record as to identity of bids carried from 94.3 to 100 per cent in identity.*

The position of the defendants may be summarized as follows: Rock salt is a homogeneous substance which for the purpose of de-icing is of the same quality regardless of the producer. It is bought strictly on the basis of price. According to the defendants, business experience has fully

*The above recited statistical data as to the results of bidding do not assume to include a summary of the entire record with respect thereto, but it is fairly representative and the percentages quoted are substantially correct.

established the necessity of attempting to have uniformity in bids made to governmental agencies. Uniformity in bidding is therefore attempted to be attained by an examination of prior bids of competitors and an independent analysis is made by each of the defendants in framing bids in an attempt to meet the bids of competitors so as to avoid the debacle in the rock salt market if price cutting were entered upon. Thus, it is argued that, although there is an individual attempt to attain uniformity in the bids made to the various governmental agencies, this attempted result is not due to any concert of action or understanding among the defendants but represents the individual exercise of common business prudence. According to the defendants, the identity of bids which the Government stresses as evidence of conspiracy to fix prices is due to four principal factors: (1) The factor growing into the makeup of most bids, i.e., the f.o.b. mine price and the common knowledge of freight rates; (2) prior bids of competitors to any governmental agencies in any State are made known and made use of in framing the next year's bids by competitive bidders; (3) additional competitive information is attained by each of the defendants obtaining public data disclosed at the opening of bids; and (4) the number of major companies producing rock salt is sufficiently small so that the bidding practices may be analyzed and followed by the others. Thus, it is urged by the defendants that the Government's attempt to deduce collaboration from mere identity of bids is completely frustrated by the record herein. It is the position of the defendants that the identity of bids stems from the attempt to adopt and match bids of competitors with the defendants acting individually in the best interests of their companies. Each of the defendants points out that the mere individual following of a competitor's announced price is not illegal even if it is carried out with the intent of achieving identical prices. Self interest, it is argued, dominates the interest of each defendant in its individual attempt to match a competitive price and not a conspiracy or understanding among the defendants, as the Government charges. In addition, the defendants argue that the express denials of collusion by the officials of the defend-

ants fully negatives the assumption which the Government assumes to deduce from parallelism in prices. And the defendants vigorously emphasize the evidence of aggressive competition among the defendants, at least at certain periods during the existence of the alleged conspiracy.

At the outset, it must be recognized that identical bids do not necessarily indicate that they emanate from collusion or conspiracy on the part of the defendants to fix prices. Moreover, ruinous competition among the producers of rock salt may well spell disaster to the entire industry. On the other hand, if there is a conspiracy to fix prices in violation of the law, defendants may not justify their action by the contention or defense that they were motivated to enter into it in order to avoid ruinous competition. It is difficult to analyze this entire record as to collaboration among the parties and with the multitude of complete identities in the bids to the very penny without concluding that this anomalous result was obtained in no other manner than by an adherence to a plan adopted by consultation and conferences among the parties involved. That the plan did not at all times prove effective and that there were sporadic departures therefrom is readily apparent. But equally so are the incidents as to conferences in meetings, by telephone, and otherwise, which were carried on by the parties in order to restore the understanding among the parties.

In finding that the plaintiff has established by a fair preponderance of the evidence that there was an agreement among these defendants to meet the bid prices of the various rock salt bidders who filed written bids with governmental agencies during the period in question and in the geographical area referred to, the Court is entirely mindful that at times when it seemed to suit their purpose, these companies have taken independent action by way of bid prices. Moreover, Morton Salt Company obtained a controlling interest in certain Canadian companies in order to compete with International, which resulted in a marked increase in the business of Morton and to the detriment of the business of International. There is evidence that during the period covered by the complaint, not only was

Diamond merely partly successful in meeting bid prices of its competitors, but that it adopted new techniques in the distribution of rock salt whereby Diamond and its distributor, Cargill, markedly increased their sales to the diminution of sales by some of the other defendant competitors. Admittedly, these circumstances may seem inconsistent with the position of the Government with reference to the alleged understanding to avoid competition in the bid prices of rock salt. But, on the other hand, it is not the position of the plaintiff that the understanding and plans of the parties at all times operated with complete efficiency. The defendants agree that they did attempt *individually* to meet the bid price of other competitors in order to avoid a spiral of prices downward which allegedly would have been ruinous to the industry. The fact that there were, during the period in question, instances of aggressive competition and strategy in attemtping to build up the individual business position by one or more of the defendants does not negative the affirmative evidence that during the period in question there was in effect among the defendants a concerted plan and effort founded upon an understanding and agreement among the parties that there should be, and was, as far as possible, a fixing of uniform prices in the bidding prices for rock salt to the governmental agencies in the areas involved. Price fixing practices by a concert of action which are condemned by the law are not freed from the law's impact merely because the plan at times broke down by the competitive acts of the so-called mavericks in the industry, or that there was not uniformity at all times in the carrying out of the plan. Moreover, even legitimate sources of information as to previous bids or computation of bids to meet a competitor's bid which are made on factors well known to all in the industry, if gathered and obtained in pursuance of a plan and understanding between and among the parties that the prices of rock salt should be uniform, may be considered as activities in furtherance of an illegal conspiracy.

In making the foregoing observations, this Court has fully recognized the principle that defendants emphasize,

to wit, that an agreement is a *sine qua non* of a price conspiracy and that the language of the Supreme Court in *Theatre Enterprises v. Paramount Film Dist. Corp.*, 346 U.S. 537 (1954), at pp. 540-41, is particularly pertinent here:

> "* * * To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. * * * But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

However, we do not only have circumstantial evidence of consciously parallel behavior, but sufficient additional facts and circumstances which amply justify the Court in concluding that by the greater weight of all the evidence the plaintiff has sustained the burden of proof which the law imposes upon it.

Plaintiff may, on September 14, 1964, at ten o'clock A.M., upon appropriate notice, present proposed findings of fact and conclusions of law and order for judgment consistent herewith. Exceptions will be reserved to the defendants.

Dated this 6th day of August, 1964.

By the Court:
Gunnar H. Nordbye
Judge

# APPENDIX B

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The complaint in this case, which was filed on July 11, 1961, alleges a conspiracy to fix the prices of rock salt. Except for the prayer for relief and other appropriate changes in form therein, the complaint is identical to an indictment filed June 28, 1961, in Criminal Action No. 4-61 Cr. 65, against Morton Salt Company ("Morton"), International Salt Company ("International"), Diamond Crystal Salt Company ("Diamond"), and Carey Salt Company ("Carey"). Prior to the trial of said criminal action, Carey pleaded *nolo contendere* and concurrently therewith a consent judgment was entered against Carey in this civil case. On June 7, 1962, after a trial which commenced on May 2, 1962, Morton, International and Diamond were acquitted of the charge set forth in the indictment by the jury impaneled in said criminal action. On November 4, 1963, a consent judgment was entered against International in this case. Pursuant to a "Stipulation Re Trial of Case on Record," filed November 4, 1963, plaintiff, Morton and Diamond agreed that this case be tried on the record made in said criminal action, as supplemented by plaintiff's interrogatories 1 and 2 filed in this case, Morton's answers thereto, and Diamond's answers thereto, as amended. The initial briefs of the plaintiff and of each defendant were concurrently filed on or about December 2, 1963, and their responsive briefs were concurrently filed on or about December 23, 1963. This Court's Memorandum Decision was filed on August 6, 1964.

## FINDINGS OF FACT

### I.

The following Findings of Fact are limited to sales of de-icing rock salt by Morton from 1956 to 1960, by Diamond from 1957 to 1960, and by other co-conspirators during that period, made under sealed bids submitted to one or more of the following government agencies: State of Minnesota, City of Minneapolis, City of St. Paul, State of Wisconsin, City of Milwaukee, State of Illinois, Illinois Toll Road, City of Chicago, Chicago Transit Authority, State of Indiana, Indiana Toll Road, State of Michigan, Wayne County, City of Detroit, State of Ohio and Ohio Turnpike.

### II.

Rock salt is the term applied to solid sodium chloride and its impurities as it is found in nature. It is mined in five principal sections of the United States, namely Louisiana, Kansas Michigan, Ohio and New York. Defendants ship rock salt in interstate commerce.

The location of the mines which were the principal sources of rock salt sold to government agencies in the Six-State Midwest Area during all or part of the years 1956-60 are as follows:

Detroit, Michigan—International;

Ojibway, Ontario, Canada—Morton;

Fairport, Ohio—Morton;

Jefferson Island, Louisiana—Diamond;

Goderich, Ontario, Canada—Sifto Salt Limited, from which Diamond purchased rock salt for resale in the United States during 1960;

Hutchinson, Kansas—Carey;

Kanapolis, Kansas—Independent Salt Company;

Lyons, Kansas—American Salt Company.

Until January, 1957, Diamond did not produce rock salt and did not sell rock salt to government agencies. At that time it acquired Jefferson Island Salt Company whose only rock salt mine is located at Jefferson Island, Louisiana.

III.

International, Morton and Diamond among them share 85-90% of the rock salt market nationwide. This degree of control is present specifically in the Six-State Midwest Area, i.e., Minnesota, Wisconsin, Michigan, Illinois, Ohio, and Indiana, the subject of concentrated proof at trial.

IV.

Defendants, with co-conspirators, in concert, adopted a policy of restrictive pricing of rock salt to the end that bidding on this commodity to be furnished to the various governmental agencies with which the conspirators did business should produce identical prices. The policy, in application, consisted simply and avowedly of not competing on prices, or otherwise stated, "meeting but not beating the price of a competitor."

V.

The policy was carried out in the main by a system of formula pricing consciously adhered to by the conspirators, relying primarily on the following:

(a) The conspirators, by concert of action, would use the same f.o.b. mine prices in computing delivered prices.

(b) The f.o.b. mine prices so used bore no relation to the conspirators' costs of production, overhead, or

anticipated profits, but were maintained at a high enough level to protect the pricing policy and better enable the conspirators to meet one another's prices.

(c) The conspirators, by concert of action, would use artificial freight rates in computing delivered prices.

VI.

Concert of action among the conspirators was achieved by the conspirators maintaining among themselves a system of intelligence, the specific purpose of which was to assure adherence to formula and arrive at identical prices to public authorities.

VII.

The system of intelligence was maintained by telephone calls and by meetings held periodically among the conspirators. The calls and meetings were among officers of the conspirators at the higher echelons. Meetings took place in Minnesota, Illinois, Michigan and elsewhere.

VIII.

The effect of the conspiracy on public authorities was to cause bids to said public authorities for de-icing salt, including the sixteen mentioned specifically in the Government's proofs as indicative of bids made by the conspirators to public authorities generally, to be identical to a substantial and in many instances to an extraordinary degree, thereby depriving said public authorities of the advantage of competitive bidding.

IX.

Plaintiff has sustained its burden of proof not only by evidence of consciously parallel behavior but also by abundant positive evidence of outright collaboration establishing the existence of agreement and understanding among the parties.

X.

The fact that there were instances of aggressive competition and strategy in attempting to build up the individual business position by one or more of the defendants, or the fact that there were breakdowns or interruptions in the uniformity of price patterns caused by so-called "mavericks" or otherwise, does not negative the preponderantly affirmative evidence established by the record as a whole that there was in effect among the conspirators a concerted and continuing plan and effort founded upon an understanding and agreement among the parties that there should be, and was, as far as possible, a fixing of uniform prices in the bidding prices for rock salt to the government agencies with which the conspirators did business.

Upon the foregoing Findings of Fact, the Court makes the following

## CONCLUSIONS OF LAW

1. The defendants are and have been engaged in trade and commerce among the several States in the sale of rock salt. The Court has jurisdiction of the parties and the cause of action herein.

2. The defendants Morton Salt Company and the Diamond Crystal Salt Company have combined and conspired

to fix prices in the sale of rock salt in violation of Section 1 of the Sherman Act as charged in the complaint.

3. A final judgment consistent herewith will be entered.

Exceptions are reserved.

Dated this 24 day of November, 1964.

By the Court:
Gunnar H. Nordbye, Judge.

# APPENDIX C

## FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on July 11, 1961, the defendants Morton Salt Company and Diamond Crystal Salt Company having appeared and filed their respective answers to the complaint, and trial of this cause having been held in accordance with the stipulation assented to by attorneys for said parties signed by the Court and filed on November 4, 1963, and the Court having on August 6, 1964, issued a Memorandum Decision directing the submission of a decree in accordance therewith and the Court having filed its Findings of Fact and Conclusions of Law on November 24, 1964,

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

I.

This Court has jurisdiction of the subject matter hereof and of said parties hereto. The complaint states a claim upon which relief may be granted against the defendants Morton Salt Company and Diamond Crystal Salt Company under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended, and defendants Morton Salt Company and Diamond Crystal Salt Company have combined and conspired to fix prices of rock salt in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act.

II.

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation, or legal or governmental entity;

(B) "Rock salt" means a common salt (sodium chloride) occurring in solid form as a mineral.

III.

The provisions of this Final Judgment applicable to the defendants Morton Salt Company and Diamond Crystal Salt Company shall also apply to their respective subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendants who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between a defendant and its officers, directors, agents, employees, parent company and subsidiaries, or any of them, when acting in such capacity.

IV.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other person to:

(A) Establish, maintain, stabilize or fix prices, pricing methods or any other terms or conditions for any sale to any third person;

(B) Submit collusive or rigged bids or quotations to any third person.

V.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any seller of rock salt to:

(A) Bid or quote, refrain from bidding or quoting or communicate an intention to bid or quote on any rock salt to be sold to any third person; or

(B) Hinder, restrict, limit or prevent any person from selling rock salt to, or purchasing rock salt from, any third person.

VI.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from directly or indirectly:

(A) Urging or suggesting to any seller of rock salt the quotation or charging of any price or other term or condition of sale for rock salt;

(B) Communicating to or exchanging with any person any information relative to prices, pricing methods or transportation charges except with prospective purchasers in connection with bona fide purchase or sale negotiations or published offers to sell;

(C) Disclosing to or exchanging with any seller of rock salt the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

(D) Selling rock salt to any reseller thereof on a commission basis.

VII.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each ordered and directed, for a period of three years after the date of entry of this Final Judgment, to submit a sworn statement in the form set forth in appendix hereto, with each bid for rock salt submitted to any governmental body, such sworn statement to be signed by a principal officer of said defendant and by the person actually responsible for the preparation of said bid; and a duplicate of each such sworn statement and of

such bid, together with the work papers used in the preparation of such bid shall be kept in the files of the defendants for a period of three years from the date of execution of such bids.

VIII.

Nothing in this Final Judgment shall be deemed to (a) prevent the defendants Morton Salt Company and Diamond Crystal Salt Company from individually or jointly with others presenting their views to appropriate regulatory agencies with respect to import tariffs or taxes upon or transportation charges for rock salt, or (b) prevent such defendants from exercising any rights they may have under the Act of Congress of 1937, commonly called the Miller-Tydings Act, as amended, or (c) require that such defendants act in violation of any law or regulation of the United States of America.

IX.

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Morton Sale Company or defendant Diamond Crystal Salt Company made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendants shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

X.

No information obtained by the means permitted in this section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

XI.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

XII.

The defendants Morton Salt Company and Diamond Crystal Salt Company are hereby ordered to pay all costs to be taxed in this case.

Exceptions to this decree are reserved.

Dated this 24th day of November, 1964.

By the Court:
Gunnar H. Nordbye,
Judge.

## APPENDIX

### AFFIDAVIT

The undersigned hereby certify to their best knowledge and belief that:

(1) The bid to.....
(name of recipient of bid) dated.....
has not been prepared by.....
(name of defendant) in collusion with any other seller of rock salt, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of.....
(name of defendant), to any other seller of rock salt and will not be communicated to any such seller,

in violation of the Final Judgment in Civil No. 4-61 Civ. 162 entered by the United States District Court for the District of Minnesota on November 24, 1964.

Dated:....., 196

.....
Signature of person responsible for the preparation of the bid.

.....
Signature of offieer.

# APPENDIX D

## ORDER

The defendants have made a motion to alter or amend the Final Judgment herein entered on November 24, 1964.

After due consideration, the motion to alter or amend is granted to the extent reflected in Paragraphs VI (B), VII, VIII (d), and the Appendix of the Amended Final Judgment filed herewith. As to other respects, the motion to alter or amend is denied. It is so ordered. Exceptions are allowed.

Dated this 19th day of February, 1965.

By the Court:
Gunnar H. Nordbye, Judge.

# APPENDIX E

## AMENDED FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on July 11, 1961, the defendants Morton Salt Company and Diamond Crystal Salt Company having appeared and filed their respective answers to the complaint, and trial of this cause having been held in accordance with the stipulation assented to by attorneys for

said parties signed by the Court and filed on November 4, 1963, and the Court having on August 6, 1964, issued a Memorandum Decision directing the submission of a decree in accordance therewith and the Court having filed its Findings of Fact and Conclusions of Law on November 24, 1964, and the Court having filed its order amending the Final Judgment on February 19, 1965.

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

I.

This Court has jurisdiction of the subject matter hereof and of said parties hereto. The complaint states a claim upon which relief may be granted against the defendants Morton Salt Company and Diamond Crystal Salt Company under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended, and defendants Morton Salt Company and Diamond Crystal Salt Company have combined and conspired to fix prices of rock salt in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act.

II.

As used in this Amended Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation, or legal or governmental entity;

(B) "Rock salt" means a common salt (sodium chloride) occurring in solid form as a mineral.

III.

The provisions of this Amended Final Judgment applicable to the defendants Morton Salt Company and Diamond Crystal Salt Company shall also apply to their re-

spective subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendants who shall have received actual notice of this Amended Final Judgment by personal service or otherwise, but shall not apply to transactions solely between a defendant and its officers, directors, agents, employees, parent company and subsidiaries, or any of them, when acting in such capacity.

IV.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other person to:

(A) Establish, maintain, stablize or fix prices, pricing methods or any other terms or conditions for any sale to any third person;

(B) Submit collusive or rigged bids or quotations to any third person.

V.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any seller of rock salt to:

(A) Bid or quote, refrain from bidding or quoting or communicate an intention to bid or quote on any rock salt to be sold to any third person; or

(B) Hinder, restrict, limit or prevent any person from selling rock salt to, or purchasing rock salt from, any third person.

VI.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from directly or indirectly:

(A) Urging or suggesting to any seller of rock salt the quotation or charging of any price or other term or condition of sale for rock salt;

(B) Communicating to or exchanging with any person any information relative to prices, pricing methods or transportation charges applicable to rock salt, except with

(1) prospective purchasers in connection with bona fide purchases or sale negotiations or published offers to sell;

(2) carriers in connection with bona fide shipments; and

(3) warehousemen in connection with bona fide storage arrangements.

(C) Disclosing to or exchanging with any seller of rock salt the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

(D) Selling rock salt to any reseller thereof on a commission basis.

VII.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each directed and ordered for a period of three years after the date of the entry of this Amended Final Judgment to prepare monthly a sworn statement in the form set forth in the Appendix hereto attached in which it shall list each bid for rock salt submitted by it to a governmental body during the next pre-

ceding calendar month. These sworn statements are to be submitted to the Department of Justice of the United States by such defendant on or before the last date of each calendar month during the three-year period commencing March 31, 1965. A duplicate of the sworn statement as to the bids listed thereon, together with the work papers used in the preparation of such bid shall be kept in the files of the defendant for a period of three years from the date of the execution of such bids.

VIII.

Nothing in this Amended Final Judgment shall be deemed to (a) prevent the defendants Morton Salt Company and Diamond Crystal Salt Company from individually or jointly with others presenting their views to appropriate regulatory agencies with respect to import tariffs or taxes upon or transportation charges for rock salt, or (b) prevent such defendants from exercising any rights they may have under the Act of Congress of 1937, commonly called the Miller-Tydings Act, as amended, or (c) require that such defendants act in violation of any law or regulation of the United States of America, or (d) prevent such defendants, or any of their respective subsidiaries, successors, assigns, officers, directors, agents, or employees, from participating in any *bona fide* distributorship or brokerage dealings or transactions not illegal under any of the antitrust laws of the United States.

IX.

For the purpose of securing compliance with this Amended Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Morton Salt Company or defendant Diamond Crystal Salt Company made to its principal

office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Amended Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendants shall submit such written reports with respect to any of the matters contained in this Amended Final Judgment as from time to time may be necessary for the purpose of enforcement of this Amended Final Judgment.

X.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Amended Final Judgment in which the United States is a party or as otherwise required by law.

XI.

Jurisdiction is retained for the purpose of enabling any of the parties to this Amended Final Judgment to apply to this Court at any time for such further orders and direc-

tions as may be necessary or appropriate for the construction or carrying out of this Amended Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

XII.

The defendants Morton Salt Company and Diamond Crystal Salt Company are hereby ordered to pay all costs to be taxed in this case.

Exceptions to this judgment are reserved.

Dated this 19th day of February, 1965.

By the Court:
Gunnar H. Nordbye, Judge.

APPENDIX

AFFIDAVIT

The undersigned, a principal officer of..... (name of defendant), being first duly sworn, certifies to his best knowledge and belief that:

(1) Listed herein under Paragraph (2) hereof are all of the bids for the sale of rock salt submitted by .....:...(name of defendant) to any governmental body during.....(month and year) and that none of the bids listed were prepared by.....(name of defendant) in collusion with any other seller of rock salt.

(2) List of bids, the name of recipient, and the date submitted during.....(month and year):

.....
.....
.....

(3) The prices, terms or conditions of said bids were not submitted or made known by..... (name of defendant) or by any employee or agent of .....(name of defendant) to any other seller of rock salt prior to the official opening of said bids in violation of the Final Judgment in Court Action No. 4-61 Civil 162 entered by the United States District Court for the District of Minnesota, as amended on February 19, 1965.

.....
(Name of defendant)

By .....

Subscribed and sworn to before me this — day of ....., 196—.

.....
Notary Public
(State and County)